IN THE

UNITED STATES SUPREME COURT

NO. 78-736

DICK MYERS TOWING SERVICE, INC.,
Petitioner

versus

THE UNITED STATES OF AMERICA;
EBY AND ASSOCIATES OF ALABAMA;
MARTIN K. EBY CONSTRUCTION COMPANY,
INC.; and EQUIPMENT RENTAL AND SALES
COMPANY, INC.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

SECONDARY AUTHORITIES

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Come now defendants, Eby & Associates of Alabama; Martin K. Eby Construction Company, Inc.; and Equipment Rental and Sales Company, Inc., (hereinafter collectively referred to as Eby) and presents herewith its arguments in opposition to the Petition For Writ of Certiorari, and prays this Court to deny review of the judgment of the United States Court of Appeals For the Fifth Circuit entered in the above styled case on August 7, 1978.

OPINIONS BELOW

On August 7, 1978 the United States Court of Appeals For The Fifth Circuit affirmed the granting of Motions For Summary Judgment on behalf of the defendants, 577 F.2d 1023 (1978), a correct copy of which has been appended to the Petition at pages 1A-8A.

JURISDICTION

Defendants Eby do not question the jurisdictional right of plaintiff to make this Petition For Writ of Certiorari.

QUESTIONS PRESENTED

I. Does there exist a conflict in decisons between circuits which calls into question the validity of the rule of law denying recovery for mere negligent interference with business expectancy?

II. Was the United States Court of Appeals For The Fifth Circuit so clearly erroneous in its application of the doctrine of *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 48 S.C. 134, 32 L.Ed. 290 (1927), so as to warrant review by this Court?

III. Was the United States Court of Appeals For The Fifth Circuit clearly erroneous in disallowing Petitioner to proceed based on a theory of public nuisance?

STATEMENT OF THE CASE

1. FACTS

Respondent sets forth as brief a capsule of the salient facts as possible because of the Petitioner's total failure to apprise the Court of the facts which gave rise to this litigation.

Martin K. Eby Construction Company, Inc., in joint venture with Equipment Rental and Sales Company, Inc., under the name and style of Eby and Associates of Alabama, contracted with the United States Government through their agency, the Mobile District Corps of Engineers, for construction of a "Replacement Lock and Non-Overflow Dam", at the John Hollis Bankhead Lock and Dam on the Black Warrior River in Tuscaloosa County, Alabama. Said contract bore number DACW01-72-C0115. The work under said contract was to provide a replacement lock and modifications to the then existing Bankhead Lock and Dam. The flow of the Black Warrior River was already interrupted by the very existence of the Lock and Dam, and the work referred to did not further impede the flow of the river.

On or about August 11, 1975 the contract between Eby and the United States had been substantially completed, and the work performed by Eby turned over to and accepted by the United States Corps of Engineers. The Lock and Dam on that date was in the hands and under the control of the Corps of Engineers. Because of a mishap in the Lock on or about August 11, 1975, the lock portion of the facility was disabled and closed to traffic for several months.

2. COURSE OF PROCEEDINGS AND DISPOSITION

Petitioner essentially states the course of proceedings to date.

ARGUMENT

In opposition to the positions and arguments of the Petition For Writ of Certiorari, defendants Eby submit herewith their agruments of law.

I. THE SUGGESTED CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE

FIFTH AND SECOND CIRCUITS DOES NOT EXIST, AND THERE EXISTS NO OTHER CREDIBLE REASON TO OVERRULE THE RULE OF LAW ADOPTED BY THIS COURT IN *ROBINS DRY DOCK AND REPAIR COMPANY V. FLINT*, 275 U.S. 303, 48 S.C. 134, 72 L.Ed. 290 (1927), OR TO FAIL TO APPLY SAID RULE TO THIS CASE.

The Petition For Writ of Certiorari presents three reasons why this Court, in its discretion, should review the ruling of the United States Court of Appeals For The Fifth Circuit. First, it is suggested that the subject case creates a conflict between the Fifth Circuit Court of Appeals and the Second Circuit Court of Appeals, and that this conflict puts in question the validity of the well recognized tort principle that there is no cause of action for "negligent" interference with business expectancy. One of the roots of this tort doctrine is found in this Court's opinion in *Robins Dry Dock and Repair Co. v. Flint,* 275 U.S. 303 48 S.C. 134, 72 L.Ed. 290 (1927). Petitioner labels the pronouncements of Justice Holmes in *Robins, supra,* as "wholly artificial", and suggests that this Court abandon this authority in favor of the recommendations of legal theorists and law review commentators.

Secondly, Petitioner implies that the United States Court of Appeals For The Fifth Circuit was clearly erroneous in applying the doctrine of *Robins* to it, because it does not resemble the unsuccessful plaintiff in *Robins*. Lastly, Petitioner suggests that the United States Court of Appeals For The Fifth Circuit committed error by not allowing it to proceed with this litigation under the "public nuisance" theory. The Petition makes its most diligent presentation in regard to the first argument or basis for review.

Petitioner seeks review by this Court of the decision of the Fifth Circuit Court of Appeals on the basis that that

decision is in conflict with a decision of the Second Circuit Court of Appeals *Petition of Kinsmen Transit Co.,* 388 F.2d 821 (2d. Cir. 1968). Petitioner further asserts that the conflict between these decisions raises a question as to whether or not the law recognizes a cause of action for recovery of loss of business expectancy based on negligence. A brief review of the respective holdings will illustrate the fallacy of Petitioner's argument.

The Fifth Circuit in the subject case recognized and applied the well established tort rule that merely negligent interference with contract rights is not actionable. This rule developed in American and British Jurisprudence in the latter half of the Nineteenth Century and the early part of the Twentieth Century. The rule became firmly established in this country with the decision of this Court in *Robins Dry Dock and Repair Co. v. Flint,* 275 U.S. 303, 48 S.C. 134, 72 L.Ed. 290 (1927). The pronouncements of law made by Justice Holmes have become canonized by numerous decisions of both State and Federal courts, and has been succinctly summarized by the *Restatement of Torts 2d.* §766 B (Tent. Draft No. 14, 1969) in the following terms:

> "[T]here is no liability for pecuniary harm caused by
> (a) negligent interference with the performance of a contract, or
> (b) negligently causing a third person not to enter into or continue a business or other advantageous relationship with another."

The *Robins, supra,* case is well documented in the annals of American Jurisprudence as the highest authority and precedent for the doctrine that there is no cause of action for negligent interference with business expectancy. In fact this rule has been universally referred to as the *Robins* rule.

The Fifth Circuit Court of Appeals had already applied *Robins,* supra, to a very similar case presented to it in 1972. *Kaiser Aluminum and Chemical Co. v. Marshland Dredging Co.,* 455 F.2d 955 (5th Cir. 1972). The Fifth Circuit on that occasion acknowledged the *Robins* rule, and held that without a showing of intentional interference no cause of action could be stated for a pecuniary loss. In the instant case the Fifth Circuit relied upon both *Robins, supra,* and *Kaiser, supra,* in affirming the District Court's grant of summary judgment.

The case of *Petition of Kinsmen Transit Co.,* 388 F.2d 821 (2d Cir. 1968) is quite factually similar to the present case. The *Kinsmen* plaintiffs sought to recover losses incurred because of their inability to use the Buffalo River, occasioned they claimed because of defendant's negligence in obstructing the flow of the river. District Court Judge Burke dismissed the claims upon the authority of *Robins, supra,* and the doctrine that recovery could not be had for a non-intentional or merely negligent interference with the plaintiff's contracts.

Judge Kaufman, authoring the opinion for the Second Circuit Court of Appeals, affirmed the decision of the District Court. Judge Kaufman opined that plaintiffs couldn't recover because their claims occurred only because the downed bridge made it impossible to move traffic along the river, and that the plaintiff's claims were too remote and tenuous to permit recovery. The opinion did not challenge the authority of the *Robins, supra,* decision, nor did it declare the doctrine of negligent interference inapplicable in the Second Circuit.

To suggest as Petitioner does that the present opinion of the Fifth Circuit and the *Petition of Kinsmen, supra,* case are at odds or in conflict is to ignore the holdings of each. Both of these cases stand for the proposition that there can

be no cause of action for non-intentional or negligent interference with contract relations or business expectations. To imply that the Second Circuit Court of Appeals has abandoned the doctrine of *Robins Dry Dock and Repair Co. v. Flint, supra,* as "wholly artificial" is to ignore the Second Circuit's 1975 decision of *Federal Commerce and Navigation Co., LTD. v. M/V Marathonia,* 528 F.2d 907 (2d Cir. 1975), and the ultimate disposition of that case. In a *per curiam* opinion, attended by Judge Kaufman, the Second Circuit Court of Appeals recognized that the *Robins* rule denies relief to one injured by negligent interference with contract, and that such rule, despite some criticism from commentators, remains a principle of law from which the Supreme Court has shown no indication to depart. Again the District Court's reliance upon *Robins Dry Dock and Repair Co. v. Flint, supra,* was affirmed.

A Petition For Writ of Certiorari then followed the Second Circuit's affirmation, and said Petition was denied by this Honorable Court in May of 1976. *Federal Commerce and Navigation Co. LTD., v. M/V Marathonia, cert. den.,* 425 U.S. 975, 96 S.C. 2176, 48 L.Ed. 2d 799 (May 19, 1976). A reading of the District Court opinion in *Federal Commerce and Navigation Co., LTD. v. M/V Marathonia,* 392 F. Supp. 908 (S.D. N.Y.), indicates that the plaintiffs there sought an abandonment of the *Robins* rule, and application of a "negligence-causation-foreseeability doctrine". Id. at p. 913. We note from the Second Circuit's opinion that the plaintiff made the same argument to the Court of Appeals. *Supra,* at 907. Of course, this "negligence-causation-foreseeability doctrine" is the basis of the Petition presently being considered, and we fell sure that the exact arguments being made by the Petitioner herein were made by the Petition For Certiorari in the *Federal Commerce and Navigation Co., LTD., v. M/V Marathonia* case.

Defendants Eby believe that the validity and vitality of the *Robins* rule remains as sound as it was in May of 1976 when this Court correctly denied a request for review based on the same challenge as presented by this Petition. This Court has been asked to retire the *Robins* rule on other occasions, and on each such occasion the Court has refused to consider abandonment of this ageless and well founded principle. *Borcich v. Annich,* 191 F.2d 392 (9th Cir. 1951), *cert. den.* 342 U.S. 905, 72 S.C. 293, 96 L.Ed. 677 (1953).

Eby urges this Court to deny this Petition as it did the petition for review in *Federal Commerce and Navigation Co., LTD. v. M/V Marathonia, supra,* and to give no credence to the theoretical postulates of those commentators who seek to cloud the validity of the *Robins* rule. The courts in their wisdom have realized what these commentators have failed to consider. The courts have universally explained that one of the bases for the *Robins* rule was the absurd extremes to which a relaxation of the rule might be taken. To allow a cause of action to everyone who suffered economic disgruntlement because of a tort to one person or his property would ensnarl the legal system beyond comprehension. Judge Kaufman recognized the dilemma that would result if a "foreseeability doctrine" went into effect. He noted:

> "Although to reason by example is often merely to restate the problem, the following illustration may be an aid in explaining our result. To anyone familiar with N.Y. traffic there can be no doubt that a foreseeable result of an accident in the Brooklyn Battery Tunnel during rush hour is that thousands of people will be delayed. A driver who negligently caused such an accident would certainly be held accountable to those physically injured in the crash. But we doubt that damages would be recoverable against the negligent driver in favor of truckers or contract carriers

> who suffered provable losses because of the delay or to the wage earner who was forced to "clock in" an hour late. And yet it was surely foreseeable that among the many who would be delayed would be truckers and wage earners."

Petition of Kinsmen, supra, at 825 n.8.

Petitioner has itself recognized the quagmire that would result if this Court approved the doctrine it suggests. On page 30 of its brief to the Fifth Circuit it suggested to that Court that the practical impositions of the suggested doctrine could be avoided by the fashioning of a rule that would allow recovery solely within the factual contours of the present controversy. Petitioner fails to foresee that if this Court honored such an argument, every litigant would be before this Court with a similar request. Clearly, in the words of Justice Holmes, "The law does not spread its protection so far."

To deny this Petition works no unconscionable prejudice to Petitioner. Petitioner has failed to demonstrate that it might be able to recover in this case if the purported "negligent-causation-foreseeability doctrine" supplanted the *Robins* rule. If this doctrine was born out of the postulates of Judge Kaufman in *Petition of Kinsmen, supra,* surely it would be subject to the same limitations imposed on the facts of that case. In that matter, plaintiff claimed that the defendants by their negligence had made the Buffalo River impassable. They claimed entitlement to damages for their inability to use the river going past the point of obstruction. Judge Kaufman found that the plaintiffs were not so entitled to recover, and said that these damages were too remote and too tenuous to support a cause of action.

Dick Meyer claims in this case that the defendants by their negligence made the Black Warrior River impassable, and it claims entitlement to damages from its inability to

use the river. So identical are the claims of the Petitioner with those of the *Kinsmen* plaintiff, that one must concur that even under the "negligent-causation-foreseeability" doctrine Petitioner's claims would, as a matter of law, be deemed too remote and too tenuous.

Of course, for Petitioner to suggest that it might be entitled to recover if the *Petition of Kinsmen* decision predominated, is to demonstrate a misunderstanding of that decision. Clearly, Judge Kaufman's decision merely affirmed the correctness of the rule denying recovery for negligent interference with business expectancy, and grounded his confirmation of that rule on the basis that such damages are too remote to be within the protection provided by the law. It is an incorrect analysis to suggest that the *Petition of Kinsmen* case has in some way eroded the *Robins* rule so as to allow recovery for negligent interference.

In summary, defendants Eby believe that this Petition is not worthy for review for three reasons:

First, there is no conflict between circuits in regard to whether a party can maintain a cause of action for negligent interference with business expectancy. Both the Fifth Circuit and the Second Circuit recognize that this rule, which has come to be known as the *Robins* rule, is the law of the land.

Second, the arguments made by the Petition have already been advanced to this Court by the Petition For Writ of Certiorari in *Federal Commerce and Navigation Co., LTD. v. M/V Marathonia, supra,* and those arguments are no more convincing now than they were when the Court denied certiorari in May of 1976.

Third, the opinion of the Fifth Circuit Court of Appeals is correct, since it is based upon the valid and vital precedent of *Robins Dry Dock & Repair Co. v. Flint, supra,* which compelled dismissal of this action.

II. THE FIFTH CIRCUIT COURT OF APPEALS COMMITTED NO ERROR IN APPLYING THE CASE OF *ROBINS DRY DOCK AND REPAIR CO. V. FLINT,* 275 U.S. 303, 48 S.C. 134, 72 L.Ed. 290 (1927), SO AS TO DENY THE CLAIMS OF PETITIONER.

Petitioner contends that the Fifth Circuit Court of Appeals was in error when it applied the rule of law pronounced by *Robins Dry Dock and Repair Co. v. Flint,* 275 U.S. 303, 48 S.C. 134, 72 L.Ed. 290 (1927), so as to deny Petitioner a right of recovery. Petitioner suggests that *Robins Dry Dock and Repair Co. v. Flint, supra,* actually supports a recovery on its part rather than a denial. Petitioner comes to this puzzling conclusion by suggesting that its counter part in the *Robins* situation is the owner of the damaged vessel rather than the plaintiff-time charterer who sued for its inability to use the damaged property. The Fifth Circuit saw through Petitioner's deranged comparison, noting that Petitioner had misconceived the basis for denial to the plaintiff in *Robins, supra.* The basis of Justice Holmes' denial to the *Robins* plaintiff was the absence of an interest protected by law against unintended injuries to the property of another. It is the interest for which Petitioner seeks protection which identifies it with the *Robins* plaintiff, and demonstrates its dis-similarity to the vessel owner in *Robins.*

We have attached as an appendix to this brief a copy of the original and amended complaints filed by the Petitioner in this cause. The allegations of that complaint clearly demonstrate that Petitioner's claimed interest is the right to use the Bankhead Lock and Dam. Petitioner says that because of damage done to the Lock it was prevented from using it. Petitioner does not contend that it owned the Lock; admittedly the Lock belonged to the United States Government. Petitioner does not contend that any property it

owned was damaged, merely that it lost profits from its business because of its inability to use the damaged lock.

Simple logic compels the finding of a parallel between the *Robins* plaintiff and Petitioner. The claims made by each are in fact indistinguishable. The interest for which protection is sought, the right to use the damaged property of another, is that interest which Justice Holmes found repugnant to the law unless an intent to injure existed. Accordingly, under any rational analysis of the *Robins* case, it cannot be construed as supporting a right to recover by Petitioner.

Petitioner has advanced this argument to both the District Court and the Fifth Circuit Court of Appeals, and now seeks review of their disregard for same by this Court. Yet, Petitioner fails in its burden of demonstrating that identifying Petitioner with the *Robins* plaintiff is so clearly erroneous that review by this Court is compelled. Accordingly, the Petition should not be granted on this basis.

III. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DID NOT ERR IN REFUSING TO ALLOW PETITIONER TO PROCEED BASED ON A THEORY OF PUBLIC NUISANCE.

In the court below Petitioner sought a reversal of the trial court's entry of summary judgment by contending that it had a right to recover based on a theory of public nuisance. As demonstrated by the original and amended complaints, appended to this brief (p. 1A-11A), this theory was not pled or in any way advanced at the trial court level. The Fifth Circuit Court of Appeals properly failed to consider Petitioner's right to recover on this theory based on the settled principle that a party may not raise on appeal a theory of recovery not presented in the lower court. *City of*

New Albany v. Burke, 78 U.S., 11 Wall. 96, 20 L.Ed. 155 (1870); *Coburn v. Cedar Valley Land and Cattle Co.*, 138 U.S. 196, 11 S.C. 258, 34 L.Ed. 876 (1891); *Thomas v. Taylor*, 224 U.S. 73, 32 S.C. 403, 56 L.Ed. 673 (1912); *Capp v. Humble Oil & Refining Co.*, 536 F.2d 80 (5th Cir. 1976); *Pearson v. Ecological Services Corp.*, 522 F.2d 171 (5th Cir. 1975), *reh. den.* 525 F.2d 1407; *Cedillo v. Standard Oil Co. of Texas*, 291 F.2d 246 (5th Cir. 1961), *cert. den.* 368 U.S. 955, 82 S.C. 397.

Accordingly, the Fifth Circuit Court of Appeals was entirely correct, and certainly not clearly erroneous, in failing to give consideration to this new theory of recovery Petitioner attempted to advance at the appellate level.

Furthermore, the Fifth Circuit recognized that even if it considered plaintiff's argument that the law allowed recovery for public nuisance, rephrasing the Petitioner's claim as a public nuisance does not change its essential character, so as to avoid the death knell which results because of the rule disallowing recovery for negligent interference with business expectancies.

Further still, we demonstrated in our brief to the Fifth Circuit that Petitioner could not state a cause of action for public nuisance under the laws of the State of Alabama. This was true because Petitioner would be unable to demonstrate damages different in kind from those suffered by the general public, by reason of the inability of the Lock and Dam to operate. The principles of law applicable to this issue are quite eloquently stated in the case of *Walls v. Smith*, 167 Ala. 138, 52 So. 320 (1910), a case where the Alabama Court denied a private individual a right to recover for the blocking of a public highway. The court made these pertinent statements:

> "The text-books and adjudicated cases are agreed that for an obstruction of a public and common right

of way no private action will lie, unless it be alleged and shown that the plaintiff has thereby suffered injury peculiar to himself; that is, different in kind and degree from that suffered by the public. The reason for this rule, accepted from the beginning as sufficient, is that the offender should be punished by indictment as for the maintenance of a common nuisance, or the nuisance be abated by a bill in equity in the name of the State; for otherwise suits would be multiplied intolerably.

. . . .

The reported cases show that the courts have been much vexed in the application of this general principle to particular cases. This much, however, seems clear: That if one's access from his property to the highway be so materially impaired as to effect its value, or if, while attempting to use the highway, one sustains direct injury to his personal property, an action will lie. And here we note the absence from the complaint in this case of any averment of injury of either kind. But where the obstruction is so remote from plaintiff's property as not to effect its permanent or rental value—and in this case there is no allegation that the value of plaintiff's property was impaired — so that the plaintiff is merely driven to a circuitous route or a longer road, the authorities hold that no peculiar injury is shown, but only an interference with the common right of passing and repassing.

. . . .

[I]f the plaintiff proves no special damage to himself beyond being delayed on several occasions in passing along a highway, and being obliged, in common with all others who would use the way, either to go by a less direct road or to remove the obstruction, he cannot maintain an action."

52 So. at 332.

As demonstrated by the pleadings, appellant merely claims that because of the failure of the Bankhead Lock

and Dam its towing operation was put to the additional expense of finding another route to its customers. Alabama law has conclusively established that the fact that a plaintiff is put to a more circuitous route does not show facts sufficient to demonstrate that complainant has suffered such a special injury as would entitle him to maintain an action for public nuisance. *Ayers v. Stidham,* 260 Ala. 590, 71 So. 2d 95 (1954).

Accordingly, the law of Alabama would prevent this Petitioner from maintaining a cause of action for public nuisance, and based upon this precedent the Fifth Circuit did not commit error in failing to allow Petitioner to proceed upon this theory.

Nor did the Fifth Circuit commit error by dismissing this theory because of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §403, because the Fifth Circuit had already ruled that that Act did not create a private right to sue on the part of any individual. *Guthrie v. Alabama By Products Co.,* 456 F.2d 1294 (5th Cir. 1972).

In summary, Petitioner has failed to demonstrate any clear error on the part of the Fifth Circuit Court of Appeals in failing to allow Petitioner to proceed on the theory of public nuisance. By law Petitioner was not entitled to raise this theory at the appellate level, and even had Petitioner been allowed to raise this theory the Fifth Circuit would have been compelled to dismiss same by reason of Alabama law.

CONCLUSION

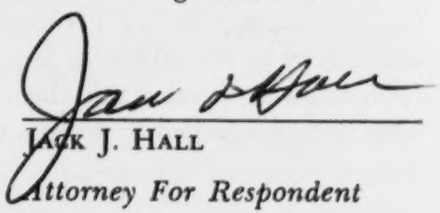
The Petition For Writ of Certiorari wholly fails to advance a legitimate basis for the issuance of a Writ of Certiorari to the Fifth Circuit Court of Appeals. Petitioner is incorrect in its suggestion that there exists a conflict between the Fifth Circuit and the Second Circuit Court of Appeals,

which calls into question the established principle of law denying recovery for negligent interference with business expectancies. The fact of the matter is that both the Fifth Circuit and the Second Circuit deny recovery for the type of damages claimed by the Petitioner in the subject suit, and neither circuit has abandoned the *Robins* rule.

Futhermore, the arguments Petitioner advances for overturning *Robins Dry Dock and Repair Co. v. Flint, supra,* have already been expresed to this Court, and rejected by the denial of certiorari in the case of *Federal Commerce and Navigation Co., LTD. v. M/V Marathonia, supra.* Petitioner advances no new, different or more compelling reasons for abandonment of the vested *Robins* precedent than were advanced on that occasion.

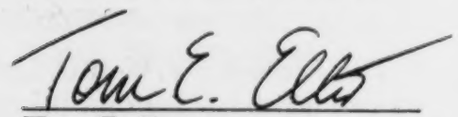
Since Petitioner clearly cannot escape identification with the plaintiff denied recovery by *Robins,* and failed to present as a theory of recovery "public nuisance" when pleading to the trial court, the Fifth Circuit was not clearly erroneous in its denial of relief to Petitioner on these bases.

Defendants Eby pray this Court to deny the Petition For Writ of Certiorari on the basis of its arguments of law.



JACK J. HALL

Attorney For Respondent



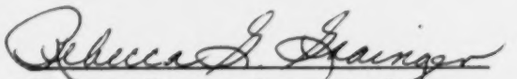
TOM E. ELLIS

Attorney For Respondent

STATE OF ALABAMA)
JEFFERSON COUNTY)

I, the undersigned Notary Public, in and for said County in said State, hereby certify that JACK J. HALL and TOM E. ELLIS, who are known to me, acknowledged before me on this day that, being informed of the contents of the foregoing, they, as counsel for the Respondents, affixed their signatures hereto voluntarily on the day the same bears date.

GIVEN under my hand this the 20th day of December, 1978, in authentication of which I have hereunto affixed my official seal.



NOTARY PUBLIC, STATE AT LARGE

CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Brief in Opposition to the Petition For Writ of Certiorari have been served on the counsel of record for each party on the day of December, 1978, by United States mail, postage prepaid, and properly addressed.

Tom E. Eby

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
– SOUTHERN DIVISION –

DICK MEYERS TOWING SERVICE, INC., a corporation Plaintiff,	)	
v.	)	
THE UNITED STATES OF AMERICA, a corporation sovereign; EBY & ASSOCIATE OF ALABAMA, a joint venture; MARTIN K. EBY CONSTRUCTION COMPANY, INC., a corporation, Defendants.	)	Civil Action No. 76-420-P COMPLAINT

FIRST CAUSE OF ACTION

1. This is a suit in the nature of a civil action against The United States of America and others, and jurisdiction is based on *United States Code,* Title 28, Section 1346.

2. At all times hereinafter mentioned, Plaintiff Dick Meyers Towing Service, Inc., was and is an Alabama corporation, with its principal place of business in Mobile, Alabama.

3. At all times hereinafter mentioned, Defendant The United States of America was and is a corporation sovereign.

4. At all times hereinafter mentioned, Defendant Eby & Associate of Alabama was and is a joint venture composed of Martin K. Eby Construction Company, Inc., a corporation; and Equipment Rental and Sales Company, Inc., a corporation, and has its principal place of business in Tuscaloosa, Alabama.

5. At all times hereinafter mentioned, Defendant Eby Construction Company, Inc., is a corporation with its principal place of business in Wichita, Kansas.

6. On or about the 23rd of June, 1972, The United States of America by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army, let Contract No. DACW 01-72-C-0115 (the "contract") for the construction and/or replacement of a lock and dam on the Black Warrior River in Alabama hereinafter sometimes referred to as the Bankhead Lock and Dam, or Bankhead Lock.

7. On or about the 11th day of August, 1975, the Defendant, The United States of America, by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army, was operating and maintaining said Bankhead Lock and Dam.

8. On or about 11th day of August, 1975, said Bankhead Lock and Dam failed, or failed to operate properly, causing the cessation of waterborne commerce and transportation on the Black Warrior River in Alabama.

9. On or about 11th day of August, 1975, the Plaintiff Dick Meyers Towing Services, Inc., was operating tugboats and/or other waterborne vessels in the performance of waterborne commerce and transportation on the Black Warrior River in Alabama, near the said Bankhead Lock and Dam.

10. The Defendants Eby & Associate of Alabama and Martin K. Eby Construction Company, Inc., in performing the completion of the aforementioned contract, provided such unworkmanlike construction as to cause the aforementioned failure of said Bankhead Lock and Dam.

11. As a direct and proximate consequence of said Defendants' unworkmanlike construction and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and

business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendants in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

SECOND CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Service, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. Defendants Eby & Associate of Alabama and Martin K. Eby Construction Company, Inc., so negligently constructed said Bankhead Lock and Dam as to cause the aforementioned failure of said Bankhead Lock and Dam.

3. As a direct and approximate consequence of said Defendants' negligent construction and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendants in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

THIRD CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Service, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. In the performance of said contract hereinabove mentioned, Defendants Eby & Associate of Alabama and Martin K. Eby Construction Company, Inc., so negligently designed the construction of said Bankhead Lock and Dam as to cause the aforementioned failure of said Bankhead Lock and Dam.

3. As a direct and proximate consequence of said Defendants' negligent design and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendants in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

FOURTH CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Services, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. The Defendant, The United States of America, by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army, so negligently operated said Bankhead Lock and Dam at the times heretofore mentioned as to cause said failure of said Bankhead Lock and Dam.

3. As a direct and proximate consequence of said Defendant's negligent operation and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendant in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

FIFTH CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Services, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. The Defendant, The United States of America, by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army, so negligently maintained said Bankhead Lock and Dam at the times heretofore mentioned as to cause said failure of said Bankhead Lock and Dam.

3. As a direct and proximate consequence of said Defendant's negligent operation and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendant in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

SIXTH CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Services, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. The Defendant, The United States of America, by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army, so negligently failed to inspect the construction and operation of said Bankhead Lock and Dam at the times heretofore mentioned as to cause said failure of said Bankhead Lock and Dam.

3. As a direct and proximate consequence of said Defendant's negligent failure to inspect and subsequent failure of said Bankhead Lock and Dam Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendant in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

SEVENTH CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Service, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. The Defendants, in the performance of the aforementioned contract, and in the operation of said Bankhead Lock and Dam provided such unworkmanlike construction, such negligent construction, such negligent design, so negligently operated said Bankhead Lock and Dam and so negligently failed to inspect the operation, maintenance, and construction of said Bankhead Lock and Dam as to cause the said failure aforementioned.

3. As a direct and proximate consequence of said Defendant's aforesaid negligence and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendants in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

/s/ MICHAEL A. WERMUTH

Attorney for Plaintiff
157 North Conception Street
Mobile, Alabama 36602
(205) 432-0738

/s/ J. MICHAEL DRUHAN, JR.

Attorney for Plaintiff
157 North Conception Street
Mobile, Alabama 36602
(205) 432-0738

Of Counsel:
WILKINS & DRUHAN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
– SOUTHERN DIVISION –

DICK MEYERS TOWING SERVICE, INC., a corporation Plaintiff, v. THE UNITED STATES OF AMERICA, a corporation sovereign; EBY & ASSOCIATE OF ALABAMA, a joint venture; MARTIN K. EBY CONSTRUCTION COMPANY, INC., a corporation; and EQUIPMENT RENTAL AND SALES COMPANY, INC., a corporation, Defendants.	)	Civil Action No. 76-420-P COMPLAINT

AMENDMENT TO COMPLAINT

Plaintiff amends its original complaint by adding as a defendant Equipment Rental and Sales Company, Inc., a corporation.

Plaintiff further amends its complaint by changing paragraph "5" of its First Cause of Action to read as follows:

"5. At all times hereinafter mentioned, Defendants Martin K. Eby Construction Company, Inc., and Equipment Rental and Sales Company, Inc., were and are corporations with their principal places of business in Wichita, Kansas."

Plaintiff further amends its complaint by changing paragraph "10" of its First Cause of Action to read as follows:

"10. The Defendants Eby & Associate of Alabama, Martin K. Eby Construction Company, Inc., and Equip-

ment Rental and Sales Company, Inc., in performing the completion of the aforementioned contract, provided such unworkmanlike construction as to cause the aforementioned failure of said Bankhead Lock and Dam."

Plaintiff further amends its complaint by changing paragraph "2" of its Second Cause of Action to read as follows:

"2. Defendants Eby & Associate of Alabama, Martin K. Eby Construction Company, Inc., and Equipment Rental and Sales Company, Inc., so negligently constructed said Bankhead Lock and Dam as to cause the aforementioned failure of said Bankhead Lock and Dam."

Plaintiff further amends its complaint by changing paragraph "2" of its Third Cause of Action to read as follows:

"2. In the performance of said contract hereinabove mentioned, Defendants Eby & Associate of Alabama, Martin K. Eby Construction Company, Inc., and equipment Rental and Sales Company, Inc., so negligently designed the construction of said Bankhead Lock and Dam as to cause the aforementioned failure of said Bankhead Lock and Dam."

/s/ MICHAEL A. WERMUTH
Attorney for Plaintiff
Post Office Box 154
Mobile, AL 36601
(205) 432-0738

Of Counsel:
WILKINS & DRUHAN

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury as to all issues in this case.

/s/ MICHAEL A. WERMUTH
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
– SOUHERN DIVISION –

DICK MEYERS TOWING SERVICE, INC.,	)	
Plaintiff	)	Civil Action
v.	)	No. 76-420-P
UNITED STATES OF AMERICA, etc., et al.,	)	
Defendants	)	

AMENDMENT TO COMPLAINT

Plaintiff amends its Complaint as of course under Rule 15 (a), in the following respects:

"FOURTH CAUSE OF ACTION

(Add the following as paragraph number "4")

4. Plaintiff avers that it has presented a claim for damages to the U.S. Army Corps of Engineers, as more particularly shown by Exhibit "A" attached hereto, and made part hereof, and further avers that said agency has failed to make a final disposition of said claim for a period of at least six months next preceeding the institution of the instant action."

"FIFTH CAUSE OF ACTION

(Add the following as paragraph number "4":)

4. Plaintiff avers that it has presented a claim for damages to the U.S. Army Corps of Engineers, as more particularly shown by Exhibit "A" attached hereto, and made part hereof, and further avers that said agency has failed to make a final disposition of said claim for a period of at least six months next preceeding the institution of the instant action."

"SIXTH CAUSE OF ACTION

(Add the following as paragraph number "4":)

4. Plaintiff avers that it has presented a claim for damages to the U.S. Army Corps of Engineers, as more particularly shown by Exhibit "A" attached hereto, and made part hereof, and further avers that said agency has failed to make a final disposition of said claim for a period of at least six months next preceeding the institution of the instant action."

"SEVENTH CAUSE OF ACTION

(Add the following as paragraph number "4":)

4. Plaintiff avers that it has presented a claim for damages to the U.S. Army Corps of Engineers, as more particularly shown by Exhibit "A" attached hereto, and made part hereof, and further avers that said agency has failed to make a final disposition of said claim for a period of at least six months next preceeding the institution of the instant action."

/s/ MICHAEL A. WERMUTH

Attorney for Plaintiff
Dick Meyers Towing Service, Inc.
Post Office Box 154
Mobile, AL 36601
(205) 432-0738

CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of November, 1976 served a copy of the foregoing amendment on counsel to all parties to this proceeding by serving Jack J. Hall, Esquire, attorney for EBY & ASSOCIATE OF ALABAMA,

MARTIN K. EBY CONSTRUCTION CO., INC., and EQUIPMENT RENTAL AND SALES CO., INC., and Edward J. Vulevich, Jr., Esquire, Assistant United States Attorney, by placing the same in United States mail properly addressed and first-class postage prepaid.

/s/ MICHAEL A. WERMUTH